

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WALTER L. SMITH,	§
	§ No. 117, 2010
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for Sussex County
STATE OF DELAWARE,	§ Cr. ID No. 0105019765
	§
Plaintiff Below-	§
Appellee.	§

Submitted: April 19, 2010

Decided: May 27, 2010

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices.

ORDER

This 27th day of May 2010, upon consideration of the appellant's opening brief and the appellee's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The defendant-appellant, Walter L. Smith, filed an appeal from the Superior Court's February 16, 2010 order denying his third motion for postconviction relief pursuant to Superior Court Criminal Rule 61. The plaintiff-appellee, the State of Delaware, has moved to affirm the Superior Court's

judgment on the ground that it is manifest on the face of the opening brief that the appeal is without merit.¹ We agree and affirm.

(2) In March 2002, a Superior Court jury found Smith guilty of Attempted Rape in the First Degree, Assault in the First Degree, Burglary in the First Degree, and Wearing a Disguise During the Commission of a Felony.² This Court affirmed the Superior Court's judgment on direct appeal.³

(3) Since that time, Smith has moved for postconviction relief three times. In his first postconviction motion, Smith claimed that a) there was insufficient evidence for the jury to convict him; b) his counsel was ineffective; and c) the State improperly struck an African-American from the jury. The Superior Court denied his claims and this Court dismissed his appeal as untimely.⁴ In his second postconviction motion, Smith again claimed insufficiency of the evidence and a *Batson* violation. The Superior Court found his claims to be procedurally barred under Rule 61 and this Court affirmed.⁵

(4) In this appeal from the Superior Court's denial of his third, and latest, postconviction motion, Smith claims error on the part of the Superior Court and his trial counsel for his failure to receive an accomplice liability instruction with respect to the charge of attempted rape. He also claims error on the part of his

¹ Supr. Ct. R. 25(a).

² Smith was acquitted of the additional charge of Possession of Burglar's Tools.

³ *Smith v. State*, Del. Supr., No. 271, 2002, Veasey, C.J. (Dec. 23, 2002).

⁴ *Smith v. State*, Del. Supr., No. 202, 2004, Jacobs, J. (Aug. 13, 2004).

⁵ *Smith v. State*, Del. Supr., No. 533, 2007, Holland, J. (Mar. 20, 2008).

appellate counsel for failing to raise the issue on direct appeal. According to Smith, based upon the evidence presented at trial, he was entitled to a determination by the jury of his own individual “culpable mental state” and “accountability” for the crime.⁶

(5) Before addressing the merits of a postconviction motion pursuant to Rule 61, the Superior Court must first address the procedural requirements of the rule.⁷ In this case, the record reflects, and Smith does not contest, that his claims are procedurally barred.⁸ He argues, however, that his claims should be considered on their merits because the absence of an accomplice liability instruction at his trial amounted to a miscarriage of justice under Rule 61(i)(5).

(6) The record before us reflects the following. The State proceeded against Smith as a principal, not an accomplice, in the attempted rape and, therefore, did not request an accomplice liability instruction. Smith’s attorney argued to the jury that there were other participants in the crime, but also did not request an accomplice liability instruction. The victim testified that there was only one person present at the time of the crime. Eyeglasses found at the scene were linked to Smith. Smith testified that he went to the victim’s apartment with two other individuals to commit a burglary and that his job was to act as the lookout.

⁶ Del. Code Ann. tit. 11, §§271 and 274.

⁷ *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

⁸ Super. Ct. Crim. R. 61(i)(1), (2), (3), and (4).

He stated that he waited outside the apartment at first, but then went inside. Smith admitted that he struck the victim as she lay under a blanket. A defense witness testified that, shortly before the crime was committed, Smith left her apartment with two other men.

(7) The record reflects that the jury was instructed that, in order to convict Smith of Attempted Rape in the First Degree, it had to find beyond a reasonable doubt that Smith intentionally engaged in conduct that constituted a substantial step in a course of conduct planned to culminate in the commission of the act of first degree rape⁹ by attempting to engage in sexual intercourse with the victim without her consent, and, during the commission of the crime, caused physical injury to the victim.¹⁰ In addition to Attempted Rape in the First Degree, Smith's jury also was instructed on Attempted Rape in the Second and Third Degrees and Unlawful Sexual Contact in the First Degree as lesser-included offenses of Attempted Rape in the First Degree, the charge of which Smith was found guilty.

(8) The record reflects that Smith's jury was properly instructed in accordance with the State's prosecution of him as a principal, not an accomplice, with respect to the charge of Rape in the First Degree. Moreover, the jury convicted Smith of Attempted Rape in the First Degree because it did not accept his version of the facts, but, rather, accepted the evidence supporting his conviction

⁹ Del. Code Ann. tit. 11, §531(2).

¹⁰ Del. Code Ann. tit. 11, §773(a)(1).

of that charge.¹¹ The jury specifically declined to convict him of any of the three lesser-included offenses on which they had been instructed. Smith has presented no support for his claim that the presence of an accomplice liability instruction would have altered the outcome of his trial in any respect. As such, even assuming error on the part of the judge and Smith's counsel, there is no evidence that he suffered any prejudice whatsoever as a result. Because there is no evidence of a miscarriage of justice in this case, we conclude that the Superior Court properly denied Smith's motion for postconviction relief.

(9) It is manifest on the face of the opening brief that the appeal is without merit because the issues presented on appeal are controlled by settled Delaware law and, to the extent that judicial discretion is implicated, there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

¹¹ As stated in this Court's decision on Smith's direct appeal, "Given the evidence presented at the trial, the jury's total rejection of Smith's theory of the case supports the fact that there was no rational basis to acquit Smith The jury verdict reflects its factual determination . . . rejecting Smith's testimony that he was only acting as a lookout." *Smith v. State*, Del. Supr., No. 271, 2002, Veasey, C.J. (Dec. 23, 2002).